Statement of Professor Peter J. Henning
Before the House Judiciary Committee
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CHAIRMAN CONDINO AND MEMBERS OF THE HOUSE JUDICIARY COMMITTEE: My name is Peter J. Henning, and I am a Professor of Law at Wayne State University Law School in Detroit, Michigan. I teach courses in, among other things, Professional Responsibility & the Legal Profession. I am testifying about the issue of procedures for review of a motion to disqualify Justices of the Michigan Supreme Court from a case.

Disqualification and Conflicts of Interest

Michigan Court Rule (MCR) 2.003 provides the general procedure for the disqualification[1] of a judge. MCR 2.003(B) describes the essential basis, that "the judge cannot impartially hear a case." The rule then provides a list of instances that can trigger disqualification, including bias or prejudice, personal knowledge of disputed facts, a financial connection to the litigation, or a personal connection to a party or lawyer in the matter. MCR 2.003(C) sets forth the procedure for a party to file a motion to disqualify, which is first decided by the challenged judge. If that judge denies the motion, then it is referred to the chief judge or a judge of another circuit court to decide the motion *de novo*.

While the procedures for disqualifying a judge are clear, it is less clear whether MCR 2.003(C) applies to the Justices of the Michigan Supreme Court. The rule applies to a "judge," a

[1] Disqualification is also referred to as recusal, and the terms are used interchangeably.

term that would seem to cover every member of the Michigan judiciary, including a Justice. Canon 3(C) of the Michigan Code of Judicial Conduct, which applies to all members of the judiciary, states that a judge "shall raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(B)." Canon 3(D) authorizes remittal of the disqualification if the parties waive it pursuant to MCR 2.003(D).

What is not addressed specifically in the Code of Judicial Conduct is whether the procedures of MCR 2.003(C) apply to the Justices, or whether they fall outside the *de novo* review provision. In *Johnson v. Henry Ford Hospital*, 729 N.W.2d 515 (Mich. 2007), a majority of the Justices denied a stay motion in a case based on issues related to whether the Justices should be disqualified from deciding the case. The majority stated, "[T]he motion is predicated on the erroneous notion that disqualification of a Justice of the Michigan Supreme Court is governed by the disqualification procedure set forth in MCR 2.003. *On the contrary, this procedure has never been held applicable to disqualification of Justices.*" *Id.* at 515 (Italics added). The majority cited to *Adair v. Michigan Dept. of Education*, 709 N.W.2d 567 (Mich. 2006), in which Chief Justice Taylor and Justice Markman issued a statement discussing the reasons why they were not recusing themselves from a case in which a party filed a disqualification motion. The Justices noted that "it has been the historic practice of the United States Supreme Court, and this court, for a justice not to supply reasons for why he or she does or does not recuse himself or herself from participating in a case." *Id.* at 1029. There was no further review by the other Justices of their decision not to recuse themselves, nor was the motion reviewed *de novo* as provided in MCR 2.003(C).

In a statement on the disqualification decision, Justice Cavanagh asserted that "our court rules do not address disqualification of a justice of this Court." *Id.* at 581. Justice Kelly stated that she agreed with the suggestion of Justice Weaver "that the Court should establish a particularized, written, and published procedure to govern motions to disqualify a Supreme court justice from participation in a case." *Id.* at 587. The view of the Justices appears to be that MCR 2.003(C) do not apply to their disqualification decisions, although the standards of MCR 2.003(B) govern the determination of whether a basis exists for recusal from a case.

Should There Be a Disqualification Procedure for Justices of the Michigan Supreme Court?

Canon 2(A) of the Code of Judicial Conduct states, "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. *A judge must avoid all impropriety or appearance of impropriety.*" (Italics added). Similarly, Canon 2(B) states, "At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary." The federal statute governing judicial disqualification, 18 U.S.C. § 455, provides a similar principle in subsection (a): "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Adopting a disqualification procedure that applies to all Michigan judges, including Justices of the Michigan Supreme Court, would be an application of the principles of the Code of Judicial Conduct, and something that members of the Court would likely welcome to avoid future controversies over disqualification. The first step is to require that the standards for disqualification of judges set forth in MCR 2.003(B) apply to the Justices of the Michigan Supreme Court.

The procedures provided by MCR 2.003(C) may be inadequate for a collegial body like the Michigan Supreme Court because the Justices decide each case as a group. The rule allows the chief judge to make the decision on an appeal, and that seems to be too limited in the case of the Michigan Supreme Court, in which each member has an equal vote. Therefore, I would recommend that a special disqualification procedure for Justices of the Michigan Supreme Court be adopted to address the unique nature of that body.

In his statement in *Adair*, Justice Cavanagh offered the following procedure for deciding a disqualification motion for a Justice of the Michigan Supreme Court:

> (1) *Ruling*. The Supreme Court shall decide the motion for disqualification of a justice. The challenged justice shall not participate in the determination. The Supreme Court's decision shall include the reasons for its grant or denial of the motion for disqualification.
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> (2) *Motion Granted*. When a justice is disqualified, the proceeding will be decided by the remaining justices of the Supreme Court.

709 N.W.2d at 582.

As an initial matter, it might be better to make it clear that a Justice can decide to recuse him- or herself if a motion is filed, or even without a motion, and there need not be a written opinion on the issue if the Justice decides to recuse. A Justice should be permitted to decide whether to recuse without having to make the basis known to limit the disclosure of private information, which could be embarrassing to others. If the Justice rejects the disqualification motion, then the decision should be made by the remaining Justices and the basis for their decision disclosed in a written ruling of the court. Texas Rule of Appellate Procedure 16.3(b) provides for a procedure in which the entire court sitting *en banc* decides the motion by a majority vote. Mississippi Rule of Appellate Procedure

48C(1)(iii) has a similar procedure. Exclusion of the challenged Justice from voting on disqualification is appropriate because of that person's interest in the outcome of the motion. A challenge to a number of justices should be considered individually, so that a party could not seek to preclude a majority of the Court from deciding a disqualification motion by raising the same grounds against more than one justice in the hope that a minority of the Justices could take charge of a case.

I would not recommend the adoption of the second step in Justice Cavanagh's proposal that would have only the remaining Justices decide the matter because it creates the possibility of an evenly-divided Supreme Court, which means no binding determination has been made. There should at least be the option in a case in which a party's motion for disqualification is granted of having a judge from the Court of Appeals appointed to hear the matter, chosen by lottery or some other method that would make the selection random. Such an approach would prevent, or at least limit, the strategic use of a disqualification motion to remove a Justice perceived as unfavorable to a party. Random selection would lessen the effect of a removal by substituting another judge, unknown to the party at the time the motion is made, who may have views similar to the disqualified Justice. Moreover, by replacing the disqualified Justice, the Supreme Court would be at full strength and a majority opinion could issue.

The Michigan Constitution provides that "[t]he supreme court may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments." Art. VI, § 23. This provision concerns vacancies, which are usually the result of death or resignation, but the disqualification of a Justice can be viewed as a vacancy for the purposed of the particular matter. Because the Michigan Supreme Court is unique in our state's judicial system,

hearing its cases *en banc*, a disqualification would be a vacancy for which a "specific assignment" of a judge could be made.[2] The provision is not necessarily limited to the lower courts because it allows for the assignment of the judge "to perform *judicial duties*," and that can include sitting as a member of the Michigan Supreme Court to hear and decide a particular case. A procedure for selecting the judge would have to be adopted, and for the purpose of clarifying the scope of that procedure, the language of a disqualification provision can specifically permit the selection of a Court of Appeals judge to serve as a member of the Supreme Court for that specific assignment.

Implementing a Disqualification Procedure for Supreme Court Justices

It is unlikely that the Michigan Legislature can simply enact legislation to create a procedure for disqualification of Supreme Court Justices. The current procedure in MCR 2.003 is one adopted by the Supreme Court to govern the Michigan courts, and the Legislature does not have the authority to prescribe directly such rules. The interpretation of the reach of MCR 2.003 enunciated in *Adair* is a judicial precedent, supported by four Justices of the Supreme Court, and it is not clear whether (or how) the Legislature could overturn that decision. It appears that the two means to enact a

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[2] In *Adair*, the statement issued by Chief Justice Taylor and Justice Markman asserts:

> [U]nlike members of the trial courts for the Court of Appeals, there can be no replacement of a justice who must recuse himself or herself. Unlike those courts in which a substitute judge can take the place of a recused judge, there is no such availability on the Supreme Court. Instead, upon a recusal by a justice, this Court must proceed with less than a full contingent of its members.

709 N.W.2d at 579. This is correct insofar as there is not a procedure for appointing a Court of Appeals judge to sit on a case before the Supreme Court. Article VI, § 23 appears to authorize such a procedure should the Michigan Supreme Court choose to adopt it.

disqualification procedure that governs the Justices is in a rule issued by the Supreme Court or through an amendment to the Michigan Constitution.

To pursue an amendment to the Michigan Constitution, the Legislature would first adopt it and then the voters would have to approve it. Such a provision need not be detailed, and could set for the basic procedure for having the Justices decide the disqualification motion and authorizing the appointment of a Court of Appeals judge to hear the case if the motion is granted, and then mandating that court rules be adopted in conformance with the amendment. As you are certainly well aware, the constitutional amendment route is much more cumbersome than enacting legislation or adopting a court rule, but this appears to be the only way in which the Legislature can be a participant in the process. I do not profess to be an expert in the Michigan Constitution, but my analysis leads me to conclude that the Legislature does not have the authority to act on the matter directly except through the amendment process.

The Michigan Supreme Court show set the standard by which the judiciary in our state operates. Adopting a procedure for considering disqualification motions would help guard against the "appearance of impropriety" required by Canon 2(A) of the Michigan Code of Judicial Conduct. I appreciate the opportunity to share my views with the Committee, and I am happy to answer any questions the Members may have.